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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

STATE OF FLORIDA, EUGENE S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLASS, etc., et al.
Appellants,
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GEORGIA PUBLIC SERVICE COMMISSION, and ATLANTIC COAST LINE RAILROAD COMPANY,
Appellees.

No. 342.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION.

Separate Brief for Atlantic Coast Line Railroad Company, Appellee, in Reply to the Separate Brief Filed by Mr. J. V. Norman on January 26, 1934, for the Appellant, Wilson Lumber Company of Florida, Suggesting Effect of Change in Governing Statute Subsequent to Decision of Court Below.

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The Atlantic Coast Line Railroad Company, one of the appellees herein, presents this its separate brief in this case, dealing only with the contention made by the Wilson Lumber Company of Florida,

one of the appellants, in a separate brief by its counsel filed on January 26, 1934.

The contention made by the appellant's separate brief to which reference is made, is that the effect of the change made in section 15a of the Interstate Commerce Act by the Emergency Railroad Transportation Act, 1933, which was approved by the President on June 16, 1933, is to deprive the Interstate Commerce Commission of the jurisdiction conferred upon it by paragraph (4) of section 13 of the Interstate Commerce Act to protect interstate commerce against undue, unreasonable, or unjust discriminations made by a State or any of its regulatory authorities. The far reaching consequences of this contention will be readily appreciated, when it is considered that, if it should be upheld, it annuls the national power to protect the instrumentalities of interstate commerce, and interstate commerce itself, against impairment or destruction by the action of a State.

In view of the importance of the question, it will probably be helpful to make a brief review of the development of the system of regulatory legislation in order to obtain an adequate background for the consideration of the question.

State Regulation Exclusive Prior to 1887

Prior to 1886, steam railroads had, for many years, constituted, in large areas of the United

States, practically the sole reliance of the American public for the distribution to market of the products of their enterprise and industry. At first, these railroads were constructed as short lines to provide a way to neighborhood markets then customarily used by the shipping, receiving and consuming public. Their distinctively local character as at first constructed may be illustrated by the following incident:

In September, 1848, while Abraham Lincoln was a member of the lower House of Congress, he had occasion to go from Washington to Massachusetts to deliver a number of campaign addresses. In traveling, for that purpose, from Philadelphia to New York, on his way to Massachusetts, it was necessary for him to use three different lines of railroad between Philadelphia and Jersey City, namely, the Philadelphia and Trenton Railroad from Philadelphia to Trenton; the Camden and Amboy Railroad and Transportation Company from Trenton to New Brunswick; and the New Jersey Railroad and Transportation Company from New Brunswick to Jersey City—all now parts of the Pennsylvania system.

Continuing his journey back to his home in Illinois, the returning Congressman was obliged to use, between Albany and Buffalo, seven different railroads, all now parts of the New York Central.

This distinctively local character of the rail-

roads, as they at first existed, and for about two generations continued to exist, gradually gave way, before the unifying forces of war, of the increasing consciousness and importance of nationality in interstate relations, and of the quick transmission by electricity of personal and commercial intelligence, until their predominantly local character disappeared and they became of nation-wide consequence and nation-wide carriers of persons and distributors of commodities.

During the early period of their construction and evolution they were so predominantly local in their relationships and service that it was natural and was considered appropriate to confine the exercise of the governmental power of regulation to the States, and it was not until 1886 that the essentially national character of their service was recognized as controlling and the conclusion reached that the time had arrived when they should be brought under the commerce power of the Federal Constitution and be regulated by Congress.

National and State Regulation 1887 to 1920

On the 21st day of March, 1885, the President of the Senate, under authority of a Senate resolution, appointed a select committee of five Senators, with Senator Shelby M. Cullom as Chairman, to investigate the subject of the regulation of in-

terstate commerce "by railroad and by water routes in connection or in competition with the railroads." This committee made a most exhaustive inquiry into the subject and, on January 18, 1886, submitted its report to the Senate.

The Committee listed eighteen special complaints against the railroad transportation system as then operated but concluded that the essence of all these complaints was the "practice of discrimination in one form or another" then existing "as between places, persons and commodities" and the burden of complaint was that these discriminations were unjust in comparison with the rates allowed or facilities afforded to other persons and places for a like service under similar circumstances.

This report resulted in the enactment by Congress of an Act entitled "An Act to regulate commerce," which was approved February 4, 1887, and which went into effect on April 5th of that year.

The fundamental purpose of the regulation prescribed by this Act, was to assure equality of opportunity to all users of these interstate agencies of transportation, so that persons and localities, similarly situated, might enjoy in their business and affairs, equality of rates, facilities and service.

While its provisions satisfied the public con-

science, it soon came to be believed that the methods provided in the Act for its enforcement were radically faulty and inadequate. It was objected that the Act "had no teeth;" that it left the Commission hampered "in obtaining access to necessary testimony and to carriers' records and books of account;" that there was no power in the Commission to enforce its orders, but that these became effective only by virtue of a court decree giving them vitality; that the law did not confer upon the Commission the power to fix maximum rates; and that the carrier, and not the Commission, was the judge, in the first instance, whether the circumstances and conditions warranted, under the fourth section of the Act, the charging of more for a shorter than for a longer haul.

Designating the period during which these objections were entertained as a period of discouragement to the Commission and to the public, Professor Winthrop M. Daniels, formerly a member of the Interstate Commerce Commission and now Professor of Transportation at Yale, in his recent interesting book on the "American Railroads," thus describes the situation beginning in 1903:

> "Before long the tide of discouragement turned. In 1903 came the Elkins Act, penalizing every departure from the published rates as an unlawful rebate. In 1906 the Hepburn Act put teeth into the law, by specially con-

ferring upon the Commission full power to fix maximum rates for railway service, and making compliance with the Commission's orders mandatory on the railroads unless stayed by a Court injunction. The Mann-Elkins Act of 1910 restored the lost vitality to the long-and-short-haul section.

"Congress had turned with a vengeance to invigorate and uphold its administrative arm, the Commission, which "out of weakness was made strong" . . .

"During this period of Congressional displeasure, the prior unrestricted powers of the railway managements had been invaded in the following important particulars. The fixation of maximum rates, after due hearing and investigation by the Commission, was taken from the management and entrusted to the new tribunal. The maximum hours of service were delimited under heavy penalty in the interest of safety of employees and travelers. The type of safety appliances and braking equipment was prescribed by law.

"The inspection of locomotives and equipment was entrusted to Federal inspectors. Accidents were investigated by the Federal Bureau. The power to suspend newly published tariffs of rates was lodged with the Commission, and the burden of proof to justify increased rates was cast on the railroads.

"A new and uniform system of keeping railroad accounts was imposed on the railroads, and the policing of accounts was entrusted to

the Commission. In emergencies requiring immediate action that body was invested with almost dictatorial powers over car service, through routes, common use of terminals, and the prescription of preference or priority for designated classes of traffic. The Clayton Act of 1914 forbade interlocking railroad directorates, and virtually required all large railroad purchases of materials and supplies to be made under a prescribed system of competitive bidding.

"The Panama Canal Act of 1912 debarred the railroads from the remotest interest in water lines traversing the canal, and divorced them from continuing their interest in all other water lines unless with express consent of the Commission.

"The culmination was reached when the Adamson Act of 1916 fixed for a time the length of the working day and the scale of wages for employees engaged in transportation. By this time the railroad Sampson had been rather effectively shorn by the Congressional 'Delilah'."

During the entire period covered by the legislation here described by Professor Daniels, the attitude of Congress toward the railroads was marked solely by a spirit of distrust and hostility.

No duty or responsibility, to the regulated subject, was recognized as resting on the government to see that, growing out of the exercise of its regu-

latory powers, the agency of transportation was kept up to the proper standard of adequacy and efficiency required by the public interest or that justice was done to private owners who had devoted their property to the public service. The whole spirit of the legislation was restrictive and punitive, with no recognition of a corresponding moral obligation resting upon the government of conservation, fairness or justice. Railroads were to be dealt with by Congress in a hostile spirit and were to be left unaided and unsupported, even in the exercise of powers necessary to the public welfare, to find a way to keep themselves adequate and efficient to perform their essential public service.

The result, as might have been anticipated, of this antagonistic attitude of Congress was an almost complete breakdown of the credit of the railroads and consequent inability on their part to provide the facilities needed to perform their transportation duties.

So acute and menacing had this situation become that on September 9, 1914, a committee of prominent railroad presidents called on President Woodrow Wilson, presenting a written statement of the financial condition of the American railroads and making the following specific requests:

> "1. That the President will call the attention of the country to the pressing necessity

for the support of railroad credit by the cooperation and sympathetic effort of the public and of all governmental authorities, and suggest that the railroads be relieved as far as possible of further immediate burdens involving additional expense; and

"2. That the President will urge a practical recognition of the fact that an emergency has arisen which requires, in the public interest, that the railroads have additional revenue, and that the appropriate governmental agencies seek a way by which such additional revenue may be properly and promptly provided."

To this request the President responded in a letter, dated September 10, 1914, as follows:

"Since you read it to me yesterday, I have read again the statement you made me on behalf of the committee of railroad presidents whom I had the pleasure of meeting and conferring with at my office. It is a lucid statement of plain truth.

"You ask me to call the attention of the country to the imperative need that railway credits be sustained and the railroads helped in every possible way, whether by private cooperative effort or by the action, wherever feasible, of governmental agencies, and I am glad to do so, because I think the need very real.

"I can not say that I entertain any deep anxiety about the matter, except, of course,

the general anxiety caused by the unprecedented situation of the money markets of the world; because the interest of the producer, the shipper, the merchant, the investor, the financier and the whole public in the proper maintenance and complete efficiency of the railways is too manifest. They are indispensable to our whole economic life, and railway securities are at the very heart of most investments, large and small, public and private, by individuals and by institutions.

"I am confident that there will be active and earnest cooperation in this matter, perhaps the one common interest of our whole industrial life. Undoubtedly men, both in and out of official position, will appreciate what is involved and lend their aid very heartily wherever it is possible for them to lend it.

"But the emergency is, in fact, extraordinary, and where there is manifest common interest we ought all of us to speak out in its behalf, and I am glad to join with you in calling attention to it. This is a time for all to stand together in united effort to comprehend every interest and serve and sustain it in every legitimate way.

"The laws must speak plainly and effectively against whatever is wrong or against the public interest, and these laws must be observed; for the rest and within the sphere of legitimate enterprise, we must all stand as one to see justice done and all fair assistance rendered, and rendered ungrudgingly."

The conditions adversely affecting the credit of the railroads having, however, continued, this letter was followed by the message of the President to Congress in December, 1915, in which he made the following recommendation:

> "In the meantime, may I make this suggestion? The transportation problem is an exceedingly serious and pressing one in this country. There has from time to time of late been reason to fear that our railroads would not much longer be able to cope with it successfully, as at present equipped and coordinated. I suggest that it would be wise to provide for a commission of inquiry to ascertain by a thorough canvass of the whole question whether our laws as at present framed and administered are as serviceable as they might be in the solution of the problem. It is obviously a problem that lies at the very foundation of our efficiency as a people. Such an inquiry ought to draw out every circumstance and opinion worth considering and we need to know all sides of the matter if we mean to do anything in the field of federal legislation.
>
> "No one, I am sure, would wish to take any backward step. The regulation of the railways of the country by federal commission has had admirable results and has fully justified the hopes and expectations of those by whom the policy of regulation was originally proposed. The question is not what we should

undo. It is, whether there is anything else we can do that would supply us with effective means, in the very process of regulation, for bettering the conditions under which the railroads are operated and for making them more useful servants of the country as a whole. It seems to me that it might be the part of wisdom, therefore, before further legislation in this field is attempted, to look at the whole problem of coordination and efficiency in the full light of a fresh assessment of circumstance and opinion, as a guide to dealing with the several parts of it.

"For what we are seeing now, what in my mind is the single thought of this message, is national efficiency and security. We serve a great nation. We should serve it in the spirit of its peculiar genius. It is the genius of common men for self-government, industry, justice, liberty and peace. We should see to it that it lacks no instrument, no facility or vigor of law, to make it sufficient to play its part with energy, safety, and assured success. In this we are no partisans, but heralds and prophets of a new age."

Congress, in response to this recommendation, adopted a joint resolution, approved July 20, 1916, providing for the appointment of a joint committee of the two Houses to make a comprehensive study of the whole transportation question. The Chairman of this committee was Sena-

tor Newlands, of Nevada, and the committee became known as the "Newlands Joint Committee."

It conducted a thorough investigation into the whole subject of transportation, holding many meetings, some in Washington and some in San Francisco. It drew out "every circumstance and opinion worth considering" and all the facts relating to all sides of the question, its final meeting being held in Washington on December 19, 1917. Before it could make its report to Congress, its Chairman, on December 23, 1917, died, and the railroads on the 28th day of that month were taken over by the government for war purposes.

However, the hearings before this joint committee exerted a profound influence upon the future regulatory legislation of Congress.

National Regulation Prescribed by the Transportation Act of 1920

Preparatory to the return by the government of the railroads to their owners, which was finally accomplished at 12.01 A. M. of March 1, 1920, it became necessary to enact legislation providing for such return and creating a new, comprehensive and constructive system of Federal regulation.

This legislation took the form of the Transportation Act, 1920. Of the ten conferees on the bill which finally resulted in this Act, five had been

members of the Newlands Joint Committee, and, in consequence of the studies of that committee and the knowledge of the subject possessed by these five conferees, the Transportation Act, 1920, for the first time expressed a recognition on the part of Congress of its responsibility to the subjects which it undertakes to regulate; of the necessity of providing and maintaining at all times an adequate and efficient system of rail transportation; of the fact that the credit of the carriers, on which their ability to perform their essential public service depends, is primarily a matter of profound and vital public concern; of the fact that the carriers were national, and not local, in their major and controlling aspects, that their ability to perform their public duties must not be destroyed by the uncoordinated, divergent and sometimes conflicting views of many different governmental authorities, and that the power of the States should not supersede and override the power of the nation in dealing with and preserving in full vigor the agencies of interstate commerce.

The definite and controlling purpose of Congress to provide for an adequate and efficient system of interstate transportation, capable at all times of meeting and satisfying the transportation requirements of the public, is manifested in many of the provisions of the Transportation Act, 1920.

1. In paragraph (18) of section 1 of the Inter-

state Commerce Act, as amended by the Transportation Act, 1920, railroads were prohibited from acquiring new lines, or extending their own lines, or abandoning all or any part of a line, or the operation thereof, without the approval of the Interstate Commerce Commission, the object being to prevent them from over-loading themselves with obligations which would interfere with the efficiency and adequacy of their services, and from depriving themselves of any part of their facilities useful to the public service.

2. In paragraph (4) of section 1 it is provided that

> "it shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor"

transportation being defined in paragraph (3) of section 1 as including

> "locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported"

thus imposing upon the carriers the duty of furnishing adequate and efficient transportation service.

3. In paragraph (11) of section 1 of the Act it is provided:

> "It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service"

and "car service" is defined in paragraph (10) of the same section as including

> "the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act"

thus again recognizing and emphasizing the duty of the carriers to furnish adequate transportation.

4. Attention is also called to the powers conferred upon the Commission in respect to adequate transportation by paragraphs (13), (14), (15) and (16) of section 1 and to the following from paragraph (21) of that section:

> "The Commission may, after hearing in a proceeding upon complaint or upon

its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines; *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public."

5. In section 500 of the Transportation Act, 1920, it is provided as follows:

> "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both *rail* and water transportation." (Italics ours.)

All the provisions above referred to of the Transportation Act indicate the settled purpose of Congress to provide for an adequate and efficient system of interstate transportation and *are in addition to the provisions of section 15a contained in the same Act.*

It should be observed also that, in the Hoch-Smith resolution, the limitation is twice placed by Congress upon anything which the Commission may do as to rates, that it shall be "with due reference to the maintenance of an adequate system of transportation" and shall be "compatible with the maintenance of adequate transportation service."

The foregoing are given in order to indicate *the determined purpose of Congress*, in its regulation of interstate carriers to make certain that the transportation service shall be adequate and efficient.

This conclusion is further emphasized and made clear by the provisions of the Emergency Railroad Transportation Act, 1933, which, while expressing the new rule of rate-making as follows:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service" (Sec. 205).

in section 2 of Title I, in providing for the appointment of a Federal Coordinator of Transportation,

defines the purpose and the extent to which such consideration must be given, as follows:

> "In order to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon resulting from the present acute economic emergency, and *in order to safeguard and maintain an adequate national system of transportation,* there is hereby created the office of Federal Coordinator of Transportation, etc." (Italic ours.)

Thus the *purpose of Congressional regulation* to provide for and assure an adequate and efficient system of national railroad transportation is expressed and is emphasized, not only by the provisions of the Interstate Commerce Act hereinbefore quoted, but also by the latest expression of Congress in the Emergency Railroad Transportation Act, 1933; and one of the leading and, under our present system of private ownership and operation, the most dominant purpose of Congressional regulation, namely, to assure an adequate and efficient system of national railroad transportation, remains unchanged and continues to be emphasized.

The *purpose* of the regulatory Act to insure a system of interstate transportation at all times adequate to the needs of the public, expressed or necessarily implied from the provisions of the Act

above quoted, is further shown by the provisions empowering the Commission to permit pooling of traffic and earnings to the extent that, in its opinion, it "will be in the interest of better service to the public or economy of operation" (Act, section 5, paragraph (1); to permit the acquisition by one carrier of control of another if, in the Commission's opinion, "it will be in the public interest" (Act, section 5, paragraph (2)); by the power conferred upon the Commission to fix minimum rates (Act, section 15, paragraph (1)), and by other similar provisions.

In fact, this Court has endorsed the foregoing conclusions, by an express holding that

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose was expressed in unequivocal language." (Here the Court referred not only to section 15a but to other provisions of the Act hereinbefore mentioned.) "And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent

among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed."—*New England Divisions Case*, 261 U. S. 189-190.

Attention is called to the provisions of the Act, referred to by the Court at bottom of page 190, having the purpose in view to ensure adequate transportation service. These include provisions other than the provisions of section 15a.

The same principle is expressed in *Dayton-Goose Creek Railway v. United States*, 263 U. S. 478, as follows:

"In both cases (referring to the Wisconsin case and to the New England Divisions case) it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the coun-

try more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

It will be noted also that the grouping of roads for the purposes of making rates did not have its origin in section 15a. As to this the Supreme Court says, in the *New England Divisions Case*, 261 U. S. 197.

"For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, . . . to be upon the carrier. Thus the practice did not have its origin in the group system of rate-making provided for in 1920 by the new section 15a. It was the actual

> necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases."

From the foregoing, it appears, not only from the provisions of the acts which have been quoted, but also from the opinions of this Court, that a very controlling purpose introduced by the Transportation Act, 1920, and apparent from many of its provisions in addition to 15a, was to ensure adequate transportation service.

It is, however, contended in the brief to which this is intended as a reply, that, because the language used by this Court in the *Wisconsin Rate Case* where reference is made to the "dovetailed relation" between that provision (sec. 13, paragraph 4) and *the purpose of section 15a*, the change in the language of section 15a made in the Emergency Act destroys the power of the Interstate Commerce Commission to prevent the States from breaking down the interstate system of transporation through the adoption by the States of unjustly discriminatory rates.

The Separate brief of the Wilson Lumber Company herein was obviously prepared under the erroneous conception that section 15a, as it originally stood, conferred power upon the Interstate Commerce Commission to make an order protecting interstate commerce against unjust discrim-

ination through acts of a State. The brief says, at page 8:

> "Thus it is that the elaborate Act," (section 15a as it originally was) "upon which the Interstate Commerce Commission relied as giving jurisdiction to enter the order in question" (which was an order removing discrimination against interstate commerce by acts of a State).

This is a plain statement that the Commission relied on 15a as authority to enter that order.

And on page 10 the following is stated in the brief:

> "It is respectfully submitted that even if the power here sought to be exercised existed under the old Section 15a, a proposition which we have always contested, no such power could possibly be found in the new Section 15a. The language of the new act affords no basis for an interpretation that Congress intended to thereby vest in the Interstate Commerce Commission power to fix intrastate rates for the purpose of removing a revenue burden on interstate commerce."

Here again the view is presented that the power of the Interstate Commerce Commission to fix intrastate rates is to be found in section 15a; and the same view permeates other portions of the brief.

But this Court has expressly held that the basis of the power of the Interstate Commerce Commission to enter the order in question *is not section 15a.* The misconception that 15a is the source of the Commission's power in the premises is disposed of by this Court in the *Wisconsin Case,* 257 U. S. 586, as follows:

> "Section 15a conferred no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its power to prescribe just and reasonable rates,' i. e., power derived from previous amendments to the Interstate Commerce Act which have never been construed or used to embrace the prescribing of intrastate rates."

The Court then goes on to hold that the power of the Commission to enter such order was conferred by paragraph (4) of section 13, which vested in it authority to remove any undue, unreasonable or unjust discrimination against interstate or foreign commerce. It will be noted that paragraph (4) of section 13, which is the source of the Commission's power to enter the order in question, remains unchanged.

When the unmistakable purpose of Congress is considered to so exercise its regulatory power that an adequate system of interstate commerce transportation should at all times be maintained

and that there should be no power to destroy this national purpose by a unjust or parsimonious attitude towards it by the States, it would seem impossible to conclude that Congress had abandoned this purpose entirely merely by a change of the *terms,* but not of the *purpose,* of section 15a.

Recalling again that this Court has held that section 15a, as it previously and originally stood, conferred no power on the Commission to deal with intrastate rates, it is obvious that the "dovetailed relations" so often referred to did not involve in the remotest degree a relation between paragraph (4) of section 13 and the *provisions or terms* of section 15a. The statement is carefully made by the Court that the "dovetailed relations" to which it refers were those between the powers of section 13, paragraph (4), and the *purposes,* not *provisions or terms,* of section 15a.

It was, of course, convenient for the Court in the *Wisconsin Case* to refer to section 15a as containing an expression of the purpose of the legislation, for in section 15a they were very definitely stated, but the reference to this section was not necessary, as the purposes on which the Court was relying for its decision appear just as unmistakably in other provisions of the Act, as indicated above, and also still continue in section 15a as it now stands after its amendment by the Emergency Act.

The change which has been made in the terms of section 15a by the Emergency Act does not change the purpose of that section, but only its provisions, and this same purpose, many times emphasized in various provisions of the Act, is likewise retained by retaining these provisions. That purpose was to maintain an adequate railway system, and the Court proceeds in the *Wisconsin Rate Case*, at page 586, to explain:

> "If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce', within the ordinary meaning of those words."

In the same case the Court said on pages 585-586:

> "Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate

traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its power to prescribe just and reasonable rates', i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, sec. 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce', within the ordinary meaning of those words."

Referring to that part of the foregoing quotation which reads as follows: "If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be", it must be observed that that consequence does not follow alone from the provision for a fixed percentage, for it would equally follow that, even without a fixed percentage, as the contribution from intrastate rates is made lower, the contribution from interstate rates must be made higher.

When we consider that the purpose to maintain an adequate system of interstate commerce appears not only in section 15a as previously written but in many other provisions of the regulatory Act, and also appears anew in section 15a as amended by the Emergency Act, there being no change in the provisions of paragraph (4) of section 13 conferring power on the Interstate Commerce Commission over intrastate rates in certain cases, it is impossible to conclude that the effect of changing the wording of Section 15a has had the effect of repealing paragraph (4) of section 13 conferring power upon the Interstate Commerce Commission to protect interstate commerce against unjust discriminations made against it or burdens placed on it by the States in their regulation of interstate commerce.

The views insisted on in the separate brief re-

ferred to, of the Wilson Lumber Company, are not entertained by Mr. John E. Benton, the General Solicitor of the National Association of Railroad and Utilities Commissioners (the State commissions), as will appear from the following colloquy, which occurred at the hearings on the proposal to amend section 15a at a session of the House Interstate and Foreign Commerce Committee on Thursday, January 28, 1932 (Hearings, p. 168):

> "Mr. Mapes. . . . Let me ask you this: How much do you suppose that your association is influenced in its judgment by the desire perhaps to have a free hand in the fixing of rates?
>
> (The 'judgment' referred to was that announced by Mr. Benton that section 15a should be substantially amended.)
>
> "Mr. Benton. You mean with respect to 15a?
>
> "Mr. Mapes. Yes.
>
> "Mr. Benton. None whatever. You probably have in mind that in former years we placed great emphasis upon that in connection with other proposed amendments, but my judgment is, as a matter of law, if you repeal section 15a outright and do nothing more it will not in any respect affect the powers which the commission has under section 13 (4) to prescribe intrastate rates as there provided."

Mr. Benton's position was that if there be a body of interstate rates, legally made, whether 15a was in existence or not, the power of the Interstate Commerce Commission to protect that legal interstate structure against unjust discrimination by the States was undeniable and was ample under paragraph (4) of section 13.

If there could be any doubt about this it seems absolutely to have been removed by the decision of this Court in the recent case of *United States of America et al.* v. *State of Louisiana, Louisiana Public Service Commission and Louisiana Highway Commission,* decided November 6, 1933, where it held that, although the rates there in question had not been made by the Commission at all, and consequently could not have been made under section 15a, the rates were still the lawful interstate rates and unjust discrimination against them might be removed by the Interstate Commerce Commission under the authority of the statute above referred to. The language of the Court in the case mentioned is as follows:

> "3. The fact that the order of the Commission for the increase of interstate rates was permissive only does not affect the validity of its order prescribing minimum intrastate rates. The interstate rates after the addition of the authorized surcharges were lawful rates in interstate commerce, which was discrim-

> inated against by the failure to make corresponding increases in intrastate rates. This discrimination the Commission removed in the manner authorized by section 13 (4), by prescribing minimum intrastate rates at the same level as the interstate rates."

This, as stated, refers to a body of rates not made by the Interstate Commerce Commission under section 15a but lawfully made by the carriers themselves and thus constituting *the lawful interstate structure of rates*, and this Court said that, inasmuch as they were the lawful rates in interstate commerce and were unjustly discriminated against by State action by the failure to make corresponding increases in intrastate rates, the power of the Interstate Commerce Commission to prescribe minimum intrastate rates at the same level as interstate rates was undeniable under paragraph (4) of section 13.

It will be noted that the foregoing contention of the Wilson Lumber Company is made in the face of the growing recognition of the peculiar importance of the national aspects of transportation in interstate commerce and of the growing national policy, indicated by the foregoing historical review, to recognize an obligation to the public to perform, by national means and under national regulation, the duty of establishing and maintaining an adequate system of interstate transporta-

tion and not to permit this to be interfered with or obstructed by any other agency whatever, State or otherwise.

Repeal by Implication

The foregoing discussion has been based upon a broad view of the leading purposes of the regulatory Act of Congress. The contention, however, here made for one of the appellants, that the alteration of the terms of section 15a operates to repeal the provisions of paragraph (4) of section 13, should perhaps be tested by the technical rules of the law in respect to repeals.

> "To establish the repeal of a statute by implication it is insufficient to show merely that a later statute, making no mention of a prior one, employed language broad enough to cover some part or all of it, but it must appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each."—*Great Northern Ry. Co.* v. *United States*, 155 Fed. 945; affirmed in 208 U. S. 452.
>
> "Repeals by implication are not favored."—*Grogan* v. *Hiram Walker & Sons*, 259 U. S. 80.

And accordingly if section 15a as now written and paragraph (4) of section 13 can both stand together, there is no justification for contending that

the change in section 15a does effect a repeal of paragraph (4) of section 13. Obviously they can still stand together; both can be administered as they are written and without conflict. In fact, the language of 15a as it now stands under the Emergency Act is as follows:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

Instead of this having a tendency to operate as a repeal of paragraph (4) of section 13, which authorizes the Commission to prevent the States by unjust discrimination to impair or burden interstate commerce, it has on its face the exactly contrary purpose and shows that the purpose of Congress still is to provide under its system of regulation for an adequate and efficient system of rail transportation.

Moreover, there is a fact in connection with the history of the change in section 15a made by the Emergency Railroad Transportation Act, 1933,

which seems to be conclusive that there was no purpose whatever to interfere by that Act with the operations of paragraph (4) of section 13. When the Emergency Railroad Transportation Act was before the Senate there was attached to it as a part of Title II—Amendments to Interstate Commerce Act—the following section:

> "The laws of the several States and orders of the commissions of the several States already in existence and hereafter enacted shall remain in effect unless the orders effecting them relate to interstate commerce."

Inasmuch as no State orders or enactments, regulating intrastate commerce, do in terms *relate to* interstate commerce, and inasmuch as the language of the foregoing provision does not refer to orders of State authorities *affecting interstate* commerce, it might have been that the enactment into law of the provision in question would have had an effect upon paragraph (4) of section 13. But the provision above quoted, which was attached to the Emergency Railroad Transportation Act in the Senate, was stricken out and was not permitted to become a part of the law. The fact of its rejection is a strong argument as to the purpose of Congress not to interfere with the operation of paragraph (4) of section 13.

CONCLUSION

Therefore, from whatever standpoint the subject is considered, there would seem to be no sound foundation for the contention that the powers of the Interstate Commerce Commission under paragraph (4) of section 13 are in any way affected or lessened by the change which has been made in section 15a. The purpose of Congress to assure at all times an adequate and efficient system of interstate transportation, and its correlative purpose to cause the States to make their fair contribution to the maintenance of such system, remains unchanged.

Respectfully submitted,

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